United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief For Appellant

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 18,392

Walter D. Cannady, Appellant

v.

United States of America, Appellee

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Appeal from the United States District Court
for the District of Columbia

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TABLE OF CASES

QUESTIONS PRESENTED

Is Appellant, ad admitted narcotics addict, entitled to a mental exam prior to trial in order to prepare a potential insanity defense. Should not the Government be compelled to produce the only corroborative witness to the actual sale of the narcotics particularly when he is a special employee of the Government. Is Appellant entitled to a continuance in order to subpoena an indispensable witness whom the Government has under subpoena and lists as their witness but whom the Government fails to produce at time of trial. Should not the Government be compelled to justify a delay of four and one-half (4-1/2) months from the time of the alleged offense until the time of the arrest.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 18,392

Walter D. Cannady, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant's court appointed attorney made a motion for mental examination on April 1, 1963 prior to trial alleging among other things, narcotic addiction of Appellant as reasons. This motion was denied and Appellant was not examined until after trial and conviction on order of Trial Court. (see criminal file) Thomas M. Mould, M. D. examined Appellant and reported among other things that he was unable to form a retroactive opinion as to Appellant's mental status on July 31 and Augustl, 1962. (see criminal file, letter from Dr. Mould dated 11/6/63).

Appellant was arrested on December 15, 1962, (see criminal file) for alleged sale of narcotics occurring on July 31 and August 1, 1962. It is uncontroverted that Agent Dillworth arranged with Nichols, a special employee of the Government, to set up a meeting between Dillworth and

Appellant (Tr. 33) that they met in Nichols' automobile (Tr. 20, 29, 52) and proceeded to the vicinity of Third and U Streets, N.E., (Tr. 23, 29, 52) on the dates in question and that on both occasions, Nichols and Appellant got out of the automobile and left Dillworth for five (5) to ten (10) minutes and returned to the automobile and left the scene in the vehicle (Tr. 22, 29 52, 54). The testimony thereafter conflicts as to whether Dillworth and Appellant transferred money and drugs or as to whether Nichols transferred drugs to Dillworth and whether Appellant was merely an innocent bystander. Appellant further notes that Nichols, the only corroborating witness was subpoened by the Government and listed as a witness by the Government (see criminal file); that Nichols failed to appear on trial date (Tr. 3) and that no continuance was allowed by the Trial Court to produce Nichols (Tr. 4). Further there was a four and one-half (4-1/2) month period between the time of offense and the time of arrest (see criminal file).

SUMMARY OF ARGUMENT

Appellant appeals from judgment of conviction on six (6) counts of the indictment in the Court below and avers that he was denied a mental examination prior to trial which deprived him of the opportunity to lay foundation for the defense of insanity. Further the Government failed to produce a corroborating witness who was peculiarly under the Government's control and subpoena and that Appellant was placed at a disadvantage thereby in procuring said witness for his own use and that the trial court precluded any reasonable attempt of a continuance in order to produce said witness; that the Government made no attempt to justify a delay of four and one-half (4-1/2) months between the offense and the arrest of Appellant.

STATUTES INVOLVED

PACKAGES

General Requirement. - It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. (Sec. 4704a, Title 26, U.S. Code.)

ORDER FORMS

General Requirement. - It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary of his delegate. (Sec. 4705a, Title 26, U.S. Code.)

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than Twenty Thousand Dollars ($20,000.00). For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and in addition, may be fined not more than Twenty Thousand Dollars ($20,000.00).

Whenever on trial for a violation of this section the defendant is shown to have to to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Sec. 174, Title 21, U. S. Code.)

ARGUMENT

I. The Court erred in the denial of Appellant's motion for mental examination on April 2, 1963.

Appellant by his Court appointed Attorney made a motion for a mental examination on April 1, 1963 avering among other reasons that he was addicted to narcotics. (see criminal file) The testimony of the Appellant shows such addiction (Tr. 55, 62) and further Appellant's records shows a conviction in 1954 for violation of the Federal Narcotic Laws (Tr. 60, U. S. Attorney's Notice of Prior Conviction, see criminal file). While Appellant takes notice of the fact that the Trial Court ordered legal psychiatry service to examine Appellant and report to the Court prior to sentencing, (see criminal file) the reported dated November 6, 1963, notes that the psychiatrist is unable to give a retroactive opinion of Appellant's mental condition on July 31 and August 1, 1962 and further that he does not have adequate facilities nor the time to do an examination in depth, of Appellant. Appellant contends that because of the denial of his motion for mental examination and because of his narcotic addiction, said denial effectively prevented Appellant from laying a foundation for the defense of insanity, and the denial of said pretrial motion for mental observation was reversible error. Robinson v. California, 370 U. S. 660. Brown v. U. S. ___U.S. App. D. C. ____#18,026.

II. The Court erred in preventing Appellant from obtaining indispensable witness.

III. Appellant was denied substantial justice by the failure of the Government to produce a corroborating witness peculiarly within the Government's control.

IV. Appellant was denied substantial justice in that there was an unjustifiable delay between the time of alleged offense and arrest.

Appellant believes that each of these arguments may be reversible error in themselves and that cumulatively they are reversible error and further that the factual situation presented herein is so interwoven that it is in the best interest of clarity to argue them together.

This Court has already taken notice of the difficulties of defense in a narcotic's case (see Willson v. U. S. __U.S. App. D.C.__#17,895) and also of the aggravating circumstances incurred by the long delay between the alleged offense and arrest. Nickens v. U.S. __U.S. App. D. C.__ #17735). In the instant case, the only witness to the actual alleged sale and transfer of the narcotics other than Dillworth and Appellant is Nichols a special employee of the Government. Nichols was present at all material times of the alleged events as testified to by Dillworth and Appellant (Tr. 22, 29, 52, 54)

The witness, Nichols, was identified by the Government as a special employee, (Tr. 3) and an informer, informant, etc., (Tr. 4, 33) and further as an addict. (Tr 35, 54).

Nichols was under subpoena by the Government issued October 2, 1963 (see criminal file) and listed as a Government witness on date of the trial, (see criminal file). Appellant was on notice of the outstanding subpoena for Nichols and his being listed as a witness for the Government. Appellant testified that he saw Nichols about one month prior to trial and Nichols indicated that he would be present and Appellant had nothing to worry about (Tr. 56) It is apparent that the Government made no serious effort to produce Nichols on the date of trial (Tr. 3) and the Government was not in the least concerned about Nichols not being present. (Tr. 3, 4)

Appellant's trial counsel was advised at the start of trial that the Government did not believe that they could produce their own special em-

ployee Nichols to testify so that Appellant [illegible] would have an opportunity to subpoena Nichols was an empty gesture particularly in view of the fact that this trial was over and the verdict of the jury in by 4:03 P.M. of the same day. (Tr. 93) And even more particularly in view of the statement of the Trial Court that no continuance could be granted due to memo of the chief judge which the Government counsel indicated he was well aware of. (Tr. 4)

Appellant contends that the Government in subpoening its special employee, the only witness who could corroborate testimony of Dillworth regarding the actual purchase or who could substantiate Appellant's testimony regarding the transaction and failing to produce him prejudiced Appellant's defense. Appellant contends that through the Government's acts, he was lolled into believing that Nichols would be present and that when he finally discovered that the Government would not produce Nichols it was fruitless for Appellant to attempt to produce Nichols in a matter of hours when the Government's vast machinery was allegedly unable to produce him. And further the Court, itself, precluded any serious attempt to produce Nichols when it notified Appellant's counsel that no continuances would be granted. The statements by Government counsel would tend to show that Government counsel anticipated that no continuances would be granted by the Court to produce this witness. As this Court has taken notice of on numerous occasions in the past, the difficulty in defending narcotic's prosecution, similar to the difficulties in the prosecution of rape. Willson v. U.S. ___U.S. App., D. C. ____#17,895.

In the instant case, the Appellant is placed in an even more difficult position by the lapse of time between the offense and arrest which amonts

ployee Nichols to testify so that Appellant [illegible] would have an opportunity to subpoena Nichols was an empty gesture particularly in view of the fact that this trial was over and the verdict of the jury in by 4:03 P.M. of the same day. (Tr. 93) And even more particularly in view of the statement of the Trial Court that no continuance could be granted due to memo of the chief judge which the Government counsel indicated he was well aware of. (Tr. 4)

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In the instant case, the Appellant is placed in an even more difficult position by the lapse of time between the offense and arrest which amonts

to four and one-half (4-1/2) months; further by the apparent reluctance of the Government to produce the only corroborating witness to the actual transaction. Could it be that the Government was not anxious to have Nichols, an informer and an addict, testify for the presecution. Could it be that the Government thought that Nichols' testimony might be helpful to Appellant rather than to the Government. Appellant contends that when the Government uses informers, addicts, etc. in order to make a case, it should not be able to wash its hands of these same employees at the prosecution of the case because of the fact that their testimony may be harmful to the Government's case. Appellant contends that the Government has no right, in effect, to hide the only corroborating witness to the alleged transaction, particularly in a narcotics case, which of its very nature is transacted in a confidential manner, when the only corroborating witness is their employee and is presumably responsible for bringing the offender to the attention of the police in the first instance. We note that the Government did not appear to be in the least concerned about going ahead with the prosecution of this case with full knowledge that they did not have the ability to produce Nichols on date of trial. We further note that at an earlier date, May, 1962, when one of the Government Agent's wife was ill, the Government requested a continuance promptly. At that time it seems apparent that the Government was not only pleased that Nichols was not present but that they may very well have been responsible for his failure to appear and that they made no strenuous effort to produce this informer. Appellant contends that the interval between the offense and arrest and that a single Government witness testifying regarding the actual transactions whopresumably made numerous buys during the period he was undercover, demands that the corroborating witness be present; that the elements of

length of time between the offense and arrest, failure to produce the corroborating witness and fialure to grant Appellant's continuance to produce said witness, all result in a denial of substantial justice (Tatum v. U.S. 88 U. S. App. D. C. 386, 190 Fed. 612) to this Appellant; and in conclusion states that the failure to do same was reversible error.

WHEREFORE, Appellant respectfully submits the judgment of the District Court should be reversed.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18392

WALTER D. CANNADY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney,
FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
DANIEL J. McTAGUE,
Assistant United States Attorneys.

QUESTIONS PRESENTED

(1) Whether it was error for the District Court to deny appellant's motion for a pre-trial mental examination filed by his court-appointed counsel and assuming *arguendo* that the denial was erroneous whether it was waived by appellant's subsequently retained counsel's disclaimer of reliance on the defense of insanity?

(2) Whether appellant's conviction on the basis of the uncorroborated testimony of an undercover officer was proper?

(3) Whether the Government was compelled to justify a delay of four and a half months between the offenses and the arrest where appellant made no claim of prejudicial delay in the District Court and no prejudice appears on the record?

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TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18392

WALTER D. CANNADY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On January 28, 1963 there was filed in the District Court a six-count indictment charging appellant with violations of the laws regulating narcotics. The charges arose from two transactions alleged to have taken place on July 31 and August 1, 1962. Appellant had made bond on December 19, 1962.

On the basis of appellant's affidavit of poverty filed February 21, 1963 the court had appointed counsel to represent appellant. This counsel filed a motion for mental examination and the motion was denied by the District Court. A copy of the affidavit of court appointed counsel to support a motion for mental examination is reproduced at the end of this brief as appellee's Appendix "A." On June 4, 1963 R. A. Brownlow, Esq., entered his appearance for appellant and on June 6 the court allowed appellant's court appointed counsel to withdraw since retained counsel had entered his appearance.

Appellant went to trial on October 14, 1963. Before the *voir dire* the court addressed appellant's counsel:

"The COURT: Because of certain questions I ask on voir dire, I would like to ask you, Mr. Brownlow, about the defense in this case.

Mr. BROWNLOW: Your honor, the defense is rather in the nature of entrapment.

The COURT: You are not going to have a defense of insanity?

Mr. BROWNLOW: No, sir. [Tr. 3.]

The prosecutor advised the court and defense counsel that a special employee of the Metropolitan Police Department who was involved in the transaction was not present, also that he had been subpoenaed and had assured some narcotics agents the previous evening that he would be present at the trial. This was done so that appellant's counsel could subpoena the special employee if he wished to do so and appellant's counsel understood this (Tr. 4).

An agent of the Federal Bureau of Narcotics testified that he first met appellant on July 31, 1962, in the vicinity of 15th and East Capitol Street, at which time appellant was seated in an automobile owned by one Nichols (Tr. 20). Nichols, a special employee, introduced Dillworth and appellant. Appellant said he understood that Dillworth had "an old lady that is strung out." (Tr. 21.) Dillworth testified this meant that he had a girl who was using narcotics (Tr. 22–23). Appellant asked Dillworth how much he wanted to spend or how much heroin he wanted. After bargaining about the price, it was agreed that Dillworth would get 20 capsules of heroin for $30 (Tr. 23). Appellant then instructed Nichols to drive to 4th and U Streets, Northeast, where they parked. Appellant asked for the money and Dillworth gave him $30 (Tr. 23–24). Appellant left the car and Dillworth started to go with him. Appellant said Dillworth could not go with him but Nichols could. The two walked to 4th and U Streets, Northeast, and then went out of Dillworth's sight for about five or six minutes. When they returned, appellant handed Dillworth some tissue paper containing a number of capsules which contained heroin. (Tr. 24.)

On August 1, 1962, in a car with Nichols in the vicinity of 15th and East Capitol Streets appellant asked Dillworth how much money he wanted to spend. Dillworth said he

wanted 50 capsules but did not want to spend the full $75 for it. Appellant agreed to the price of $70 for 50 capsules. The three then proceeded at appellant's instructions to the site of the earlier transaction where appellant received the $70. Again Dillworth started to get out of the car; appellant said no and motioned to Nichols to go with him. Nichols and appellant again walked to the corner of 4th and U Streets and went out of Dillworth's sight. When they returned to the car, appellant delivered to Dillworth the capsules containing heroin. (Tr. 28–29.)

Dillworth testified that Nichols was an informant of the Bureau of Narcotics and he had heard that Nichols was an addict. He also said that the two meetings between himself and appellant had been pre-arranged (Tr. 33–35).

Appellant testified in his own defense. He admitted being in the company of Dillworth and Nichols on the dates in question. He claimed that he was present when Nichols and one Russell Shepherd "transacted business" and that when they returned to the car Nichols passed the "package" to Dillworth. He denied receiving anything from Dillworth (Tr. 52–53). He also denied that any conversations similar to the ones recounted by the agent had transpired.

Appellant testified that he had known Nichols since 1955 or 1956 and that they were addicted to heroin (Tr. 54–55). He also said that he had seen Nichols less than a month before the trial (Tr. 55). He testified that on one occasion he spoke to Nichols about the trial and that Nichols told appellant that he "(appellant) had nothing to worry about, that he [Nichols] was going to tell the truth about the matter." (Tr. 55–56.) It appears that this conversation took place sometime subsequent to appellant's arrest and release on bond in November of 1962 (Tr. 56).

After appellant's conviction the trial court requested the Legal Psychiatric Services to determine whether appellant was mentally competent at the time of trial, whether he was suffering from a mental disease or defect at the time of the crimes, and whether those crimes were the product of any such mental disease or defect, and whether the court should make any special recommendations with regard to the place or duration of the

sentence of appellant. After the examination a psychiatrist of the Legal Psychiatric Services reported to the court that in his opinion appellant was competent at the time of the examination and was presumably competent at the time of trial, about two weeks prior to the examination. The doctor was unable to form an opinion as to whether appellant was suffering from a mental disease or defect at the time of the crimes.

Appellant was sentenced as a second offender to the mandatory minimum sentence of ten years imprisonment with the recommendation that he be committed to Lexington, Kentucky.

STATUTES INVOLVED

Title 21 U.S.C. § 174 provides:

> *Same: penalty: evidence.*—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of

1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

Title 26 U.S.C. § 4704(a)—General requirement provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. § 4705(a)—General requirement provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 24, District of Columbia Code, Section 301, provides in part:

> (a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of

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> the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.
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> * * * * *

SUMMARY OF ARGUMENT

Assuming, *arguendo*, that it was error to deny the pretrial motion for mental examination filed by appellant's court-appointed counsel, appellant is foreclosed from raising this error on appeal since the defense of insanity was specifically waived at trial by his retained counsel. In any event, the motion for mental examination was properly denied. There is no requirement that the testimony of one witness is insufficient for a conviction in a narcotics case. Appellant's argument that the absence of the special employee involved in the transactions requires reversal of his conviction is precluded by the fact that he did not subpoena the special employee either before trial or when his retained counsel was told that the special employee was not present.

The four and one-half months between the offenses and the arrest of appellant is well within the applicable statute of limitations and there is no requirement that the Government has the burden of "justifying" any delay between the offense and arrest.

ARGUMENT

I. Assuming, *arguendo*, it was error for the court to deny appellant a pretrial mental examination, appellant may not claim this as error on appeal, since his retained counsel specifically waived the defense of insanity at trial

(See Tr. 3; Appendix A.)

Appellant's pretrial motion for mental examination was filed by court-appointed counsel. The motion was denied by the District Court. Later, appellant retained new counsel and on June 6, 1963, court-appointed counsel was allowed to withdraw from the case. When appellant went to trial on October 14, 1963, the court, prior to making its *voir dire* examination of the jurors asked counsel about his defense in this case. Counsel replied that "the defense is rather in the nature of entrapment." The court asked, "You are not going to have a defense of insanity?" Counsel replied, "No, sir." (Tr. 3.)

On appeal counsel appointed by this Court now claims it was error for the District Court to deny the pretrial motion for mental examination filed by appellant's court-appointed counsel in the District Court. Assuming that this was error, any claim that the conviction should be reversed because of this error was waived when counsel retained by appellant informed the District Court at the time of trial that he was not going to rely on the defense of insanity. It is clear that the defense of insanity may be waived. *Lynch* v. *Overholser*, 369 U.S. 705 (1962). Insofar as this record discloses, the waiver of the defense of insanity was intelligently and responsibly waived and, assuming that it was available, appellant must abide by the consequences of the waiver.

The affidavit of court-appointed counsel in support of the pretrial motion for mental examination is reproduced in full at the end of this brief as appellee's Appendix A. The allegations of the affidavit are, in brief, that his grandfather and two cousins were afflicted with mental disturbances; that his true name is not Cannady and that he has refused to use his true name because he had a "complex" about his past; that he "developed a hatred of his mother during early life as a result of his mother taking into her household four children of her sister;" that he told people he was born and raised in Richmond because he wanted to be "accepted" and "liked"; that at the age

of 39 he is a "frequent and prolonged daydreamer"; that he commenced taking drugs in order to be accepted by others; that in recent years he has taken drugs because they make him "not care about the situation he is in" and make "any situation bearable"; that he has no sensible explanation of past crimes to which he has pleaded guilty except that he believes they were committed out of his "great frustration about life" and that he doubts his own sanity. (Appendix A, attached hereto.)

Contrary to the assertion in appellant's brief at Page 4, the motion and supporting affidavit do not allege that appellant was addicted to narcotics at the time of the offenses. Whether or not a mental examination will be granted to a defendant rests within the sound discretion of the trial court and it is submitted that in this case, the District Court did not abuse its discretion in denying appellant's motion for a mental examination.

II. The uncorroborated testimony of an undercover police officer was sufficient and a proper basis for appellant's conviction

(See Tr. 3–4, 55–56.)

It is well established in this jurisdiction that the uncorroborated testimony of an undercover police officer will support a conviction for violation of the Federal Narcotics Laws. *Wilson* v. *United States,* No. 17,895, decided October 3, 1963, *petition for rehearing en banc denied* February 13, 1964. See also *Morgan* v. *United States,* 115 U.S. App. D.C. 310, 319 F. 2d 711 (1963); *Fletcher* v. *United States,* 111 U.S. App. D.C. 192, 295 F. 2d 179 (1961), *cert. denied,* 386 U.S. 993 (1962); *Smith* v. *United States,* 110 U.S. App. D.C. 344, 293 F. 2d 532 (1961).

In this case appellant's counsel was informed before trial that the special employee, one William Nichols, was not present on the trial date even though he had assured one of the narcotics agents the night before trial that he would be present. Appellant's counsel understood that he was being informed of this so that he might issue a subpoena for Nichols if he wished to do so (Tr. 3–4). No subpoena for Nichols was issued by appellant's counsel and Nichols did not testify at the trial.

Appellant testified that several months before trial he had seen Nichols and that Nichols had told him that he (appellant), had nothing to worry about. (Tr. 55–56.) Assuming that Nichol's testimony would have been favorable to appellant it was clearly incumbent upon appellant or his retained counsel or both to take the necessary steps to insure the presence of Nichols at the trial. No such steps were taken. Appellant therefore may not now claim that the absence of Nichols was reversible error.

Appellant's insinuation in his brief that the Government had hidden the special employee and his rhetorical question, "Could it be that the Government was not anxious to have Nichols, an informer and an addict, testify for the prosecution[?]" have no support or justification whatsoever in the record.

III. The delay between the time of the offenses and appellant's arrest is not a ground for reversal in this case

Appellant claims that he "was denied substantial justice in that there was an unjustifiable delay between the time of alleged offense and arrest." (Appellant's brief at ii.) This claim is raised for the first time on appeal. He made no motion in the trial court in which he alleged that the delay prejudiced him in any way. Appellant testified in his own defense and his memory of the events appears to have been clear and full. The jury's verdict shows that they believed the undercover officer's version of the transactions and not appellant's. Appellant states that one of the questions presented in this appeal is whether or not the Government should be "compelled to justify a delay of four and one-half (4½) months from the time of the alleged offense until the time of the arrest." There is no doubt that the arrest and subsequent indictment occurred within the applicable statute of limitations. There was no claim in the trial court that the delay had in any way prejudiced appellant in making his defense; in fact, appellant's testimony shows that he was able to recall the events in question. In such circumstances the claim of "unjustifiable delay" is not open to him at this state of the proceedings.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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FRANK Q. NEBEKER,
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APPENDIX

In the United States for the District of Columbia Criminal Division

UNITED STATES

v.

WALTER CANNADY

AFFIDAVIT OF COURT APPOINTED COUNSEL

DISTRICT OF COLUMBIA, *ss:*

Your affiant being first duly sworn on oath in accord with law makes this affidavit and verily states as follows:

1. That he is counsel by appointment of the court to actively defend Walter Cannady, defendant in the above-entitled cause.

2. That your affiant has interviewed the defendant extensively as to the background of the case and as to the personal background of the defendant.

3. That as a result of said personal interview with the defendant your affiant has serious doubts as to defendant's mental capacity to assist council intelligently in the trial and defense of this case; and your affiant has serious doubts as to the mental health of the defendant at the time the crime with which he is charged is alleged to have been committed by him and believes the crime may have been the result of a diseased or distorted mind. These convictions of your affiant are based upon his observations of the defendant, Walter Cannady during extensive personal interview and upon the following statements and representations of the defendant Cannady: (a) that defendant's grandfather and two cousins were afflicted with mental disturbances, (b) that defendant's actual legal name is not Walter Cannady but is Walter Canty, (c) that defendant went through school in Rocky Mount, North Carolina under the name Walter Mitchell and later found out that his true name was Canty. He refused to use his true name because he had a "complex" about his past and about that name and used the name Cannady when he applied for a social secu-

rity number in 1938; (c) [*sic*] that his father died when defendant was six years of age, the defendant having four brothers and sisters at that time; that shortly after the death of his father the defendant developed a hatred of his mother during early life as a result of his mother taking into her household four children of her sister's; (d) when the defendant and his whole family moved to Richmond after graduating from high school he started to tell people that he was born and raised in Richmond because he wanted to be "accepted and liked"; (e) that at age 39 the defendant is a frequent and prolonged day dreamer; that he daydreams extensively projecting himself in these dreams into positions of high standing, sometimes dreams of himself driving expensive automobiles although he does not actually drive; (f) that he commenced taking drugs in order to be accepted by others; (g) that in recent years he has taken drugs because they make him "not care about the situation he is in" and make "any situation bearable"; that he has a history of nervous and shaking hands; when a prisoner at Lexington, Kentucky a few years ago he volunteered to undergo morphine tests but Dr. Frazee would not permit him to complete the tests because defendant became "too nervous"; (h) that he has no sensible explanation of past crimes to which he has pleaded guilty except that he believes they were committed out of his "great frustration about life"; (i) defendant say that he doubts his own sanity.

(S) JAMES F. O'DONNELL,
927 15th Street NW.
Washington 5, D.C.

Subscribed and sworn to before me this 1st day of April 1963.
My Commission Expires October 14, 1965.

LEWIS M. CALDWELL,
Notary, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1966